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In the Supreme Court of the United States

OCTOBER TERM, 1977

WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a–27a) is reported at 561 F. 2d 477. The opinion of the district court (Pet. App. 1a–8a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a–29a) was entered on August 12, 1977. The petition for a writ of certiorari was filed on November 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether employees who normally perform executive, administrative or professional work are exempt

from the overtime and maximum hours provisions of the Fair Labor Standards Act when performing rank-and-file work during a lengthy strike.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner from violating the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.* (FLSA), by failing to pay overtime compensation at one and one-half times the regular rate of pay to its "white collar" employees who performed "blue collar" work during a prolonged strike by two unions. The parties stipulated that the employees in question are normally excluded as executive, administrative, and professional employees from the Act's overtime provisions by Section 13(a)(1), 29 U.S.C. 213(a)(1). The parties also stipulated that the work involved here, when performed by rank-and-file employees, is covered by the overtime provisions (A. 38–44).[1]

During the strike, which ~~listed~~ lasted from June 1, 1971, to September 12, 1971, petitioner closed its public message service but kept operating some government services, the Telex-TWX systems used by private businesses, and the Mailgram service (A. 34–43). Approximately 2,000 white collar employees kept these services functioning; they performed principally service and maintenance functions on the various communications systems (A. 34, 38, 39, 41, 43). They worked more than 40 hours per week during the strike, but petitioner paid them only their normal salaries (A. 43).

[1] "A." refers to the appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

ministrative employees, but it granted summary judgment for the Secretary and enjoined petitioner from violating the Act with respect to professional and administrative employees, but it granted summary judgment for petitioner with respect to "executive" employees (Pet. App. 9a–11a).[2] On cross-appeals, the court of appeals held that professional, administrative, and executive employees alike lost their exemption while performing nonexempt work during the strike (Pet. App. 24a and n. 10). The court of appeals reasoned that the Act required assessment of each employee's duties during each week of work; consequently, it concluded, an employee could be an exempt managerial employee one week and a covered employee the next, depending on the character of the work he was performing.

ARGUMENT

The court of appeals' holding that managerial employees are not exempt from the overtime and maximum hours limits of the FLSA when they are assigned to replace strikers in the performance of covered work for a prolonged period is correct. It presents no issue requiring review by this Court.

[2] The district court saw a limited regulatory distinction between executives on the one hand, and professional and administrative employees on the other. Petitioner abandoned this distinction in the court of appeals and does not rely on it here.

1. It was stipulated that petitioner's managerial employees were assigned "to perform the clerical, technical, operational, and maintenance functions" normally performed by the strikers (A. 36).[3] It was also stipulated that a "substantial number" of them "devoted substantially more than 50% of their time" to such tasks and that "[those] tasks if they had been performed by the striking employees would have been non-exempt work" (A. 44).

Because the Act provides that its coverage depends on the nature of the work being performed by each employee, it follows that the employees at issue here should have been given overtime pay while performing the struck work. The exemption goes no further than its purpose, and nothing in the Act supports petitioner's argument that an employee who is generally

[3] "Managerial" employees are those "who, apart from the strike context, usually qualify for exemption from the maximum hours provisions because they function 'in a bona fide executive, administrative or professional capacity.'" Pet. App. 17a. Under Section 13(a)(1) of the Act, "executive, administrative, or professional" employees are exempt if they qualify as such under regulations of the Secretary. See 29 C.F.R. 541.1, 541.2, and 541.3. The regulations provide that employees are ineligible for exemption if they devote more than 20 percent of the "hours of work in the workweek" to non-exempt activities. 29 C.F.R. 541.1(e), 541.2(d), and 541.3(d). Employees who devote more than 20 percent of their time to covered work in any week still may be exempt if certain salary and other tests are met and the "primary duty" of the employee is "management" (in the case of executives; *id.* at 541.1(a)), or of "office or nonmanual work directly related to management policies or general business operations" (in the case of administrative employees; *id.* at 541.2(a)), or of work "requiring knowledge of an advanced type in a field of science or learning" or work that is "original and creative in character in a recognized field or artistic endeavor" (in the case of professional employees; *id.* at 541.3(a)).

engaged in managerial work retains his exemption even when he forswears managerial work and begins to do something else.

The fact that petitioner continued to pay the strike replacements their usual salaries (Pet. 7) does not affect the outcome. The Act does not set any upper limit to the salaries of those who are subject to the Act's overtime requirements. A "blue collar" worker is covered by the Act even if he is paid $50 per hour or $1,000 per week; the Act is not limited to the penurious worker. The overtime rules compensate an employee in a specific manner for the strain of working longer than forty hours per week (*Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446, 470; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423–424; *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 40, 42). The employees here were required to work long hours over an extended period, performing tasks admittedly within the contemplation of the overtime provisions. The "specific manner" prescribed by the statute (*Bay Ridge, supra*, 334 U.S. at 470) of compensating for such hours is time and a half (29 U.S.C. 207(a)(1)). Nothing in the statute or its legislative history supports petitioner's suggestion that the overtime premium is not applicable if the normal salary is higher than the minimum wage (Pet. 6)[4] or the rate

[4] Petitioner suggests (Pet. 5–6) that the Act applies only to nonunionized workers, not to workers who can "protect themselves" by joining a union or by belonging to management. No case has limited the protections of the Act to employees who cannot organize for their own protection, and the Act, on its face, allows no such distinction.

paid to rank-and-file employees for the same work (Pet. 7).[5]

An employee may gain and lose exemption depending on the nature of his work. The Act's compensation standards are based on the "workweek"; the minimum hourly rate must be paid to "each of [the] employees who in any workweek is engaged in commerce * * *." 29 U.S.C. 206(a). The overtime premium likewise must be paid to any employee engaged in commerce "in any workweek." 29 U.S.C. 207(a)(1).

Section 13(a)(1), which creates the managerial exemption, embodies the workweek as the basic unit of scrutiny; in providing for the special case of retail store managers, it extends the exemption to those whose nonmanagerial work is "less than 40 per centum of [their] hours worked in the workweek * * *." 29 U.S.C. 213(a)(1).[6] An employee thus may be an

[5] The Secretary's regulations take salary levels into account by providing that no employee may qualify for the managerial exemption unless he receives a certain minimum salary. 29 C.F.R. 541.1(f), 541.2(e), and 541.3(e). But compliance with the salary test alone is not sufficient to make an employee exempt; the employee also must be doing managerial work. *George Lawley & Son* v. *South*, 140 F.2d 439, 444 (C.A. 1), certiorari denied, 322 U.S. 746; *Helliwell* v. *Haberman*, 140 F.2d 833, 834 (C.A. 2); *Usery* v. *Associated Drugs, Inc.*, 538 F.2d 1191, 1194 (C.A. 5).

[6] See also the repeated application of the "workweek" standard in numerous variations and qualifications of the compensation requirements throughout the Act; *e.g.*, 29 U.S.C. (and Supp. V) 206(b), 206(f) (1) and (2), 207(a)(2), 207(e)(5), (6), and (7), 207(f), 207(g), 207(i), 207(*l*), 207(m)(2), 213(b)(7), 213(b)(8) (A) and (B), 213(b) (18), (19), (23), (25), and 213(h)(2).

exempt manager one week and a covered worker the next.[7]

In sum, nothing in the statute or the regulations freezes an employee's exempt status. The Secretary's construction of the statute and of his implementing regulations should be respected. Exemptions from the wage standards of the Act are to be construed narrowly and are to be allowed only on a showing by the employer that the case is "plainly and unmistakably within [the] * * * terms and spirit" of the exemption claimed. *Phillips Co.* v. *Walling*, 324 U.S. 490, 497; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392. Petitioner made no such showing here, and the Secretary's position therefore falls "well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers." *National Labor Relations Board* v. *Enterprise Association*, 429 U.S. 507, 528.

2. *McReynolds* v. *Pocahontas Corp.*, 192 F. 2d 301 (C.A. 4), which petitioner cites as conflicting with the present case (Pet. 4–5), decided that certain mine section foremen were "executives" within the meaning

[7] Courts consistently have used the workweek as the basis for application of the Act's compensation standards even where the Act does not explicitly use the term. Thus, to comply with the Act's standards, wages must be sufficient in each workweek; it is no defense that the average pay over longer periods is adequate, or that higher pay in one workweek makes up for deficiencies in another. See *Gatlin* v. *Mitchell*, 287 F. 2d 76, 79 (C.A. 5); *Roland Electric* v. *Black*, 163 F. 2d 417, 420–421 (C.A. 4), certiorari denied, 333 U.S. 854; *Dunlop* v. *New Jersey*, 522 F. 2d 504, 510–511 (C.A. 3), vacated on other grounds *sub nom. New Jersey* v. *Usery*, 427 U.S. 909.

of the exemption. The court rejected in passing the argument that one foreman who did manual work during a strike thereby lost his exempt status. The court cited only *Mafizola* v. *Hardy-Burlinhame Mining Co.*, 306 Ky. 492, 497–498, 207 S.W. 2d 769, 771–772, which itself stated the proposition without substantial analysis.

In our view, *McReynolds* was wrongly decided. But the apparent conflict among the circuits does not require review at the present time. *McReynolds* was decided in 1951; the Fourth Circuit might well reach a contrary conclusion if the question were presented today, given the development of the controlling legal principles during the last 27 years. If the Fourth Circuit should adhere to its position after additional consideration, there would be time enough for review by this Court.

3. There is nothing to petitioner's argument (Pet. 8–11) that the decision below contravenes the policy of the National Labor Relations Act by imposing a burden on employers that desire to wage economic war against their employees. It is far from clear that a court would be entitled to make FLSA give way because it impeded achievement of some other statutory goal; different enactments at different times often reflect different emphases concerning the importance of different goals. The National Labor Relations Act, for example, permits unfettered collective bargaining concerning wages, yet the FLSA sets a minimum wage that interdicts bargaining for some lower wage. Both statutes must be obeyed, and the employer cannot be relieved of the requirements

of one because of asserted policy implications underlying the other. The fact that an employer may demand blue-collar work from its white-collar employees in no way frees the employer from complying with its statutory wage obligations covering blue-collar work.

However that may be, there is no conflict in policy here.[8] The FLSA does not "disarm" (Pet. 8) employers from using managerial employees to stay in business during a strike. It provides only that the employers must pay their employees at a rate that takes into account their hours of work and the nature of the work they actually perform during the strike. The employers cannot demand 60 hours' work for 40 hours' pay. The application of the FLSA to managerial employees may increase the employer's wage costs, but, as the court of appeals properly concluded (Pet. App. 22a):

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[8] We see no common ground between this decision on the one hand and *American Broadcasting Companies, Inc.* v. *Writers Guild of America, West, Inc.*, and its companion cases, Nos. 76–1121, 76–1153 and 76–1162, argued December 5, 1977, ordered set for reargument December 12, 1977, on the other. *Writers Guild* presents the question whether a union may lawfully discipline its members who cross picket lines to perform only their supervisory duties during a strike. To resolve that question the Court must decide whether union discipline under the circumstances is a restraint of the employer's selection of bargaining and grievance adjustment representatives in violation of Section 8(b)(1)(B) of the National Labor Relations Act, 61 Stat. 141, 29 U.S.C. 158(b)(1)(B). The answer to that question, whatever it might be, does not implicate the Fair Labor Standards Act, which concerns obligations of an employer. *Florida Power and Light Co.* v. *International Brotherhood of Electrical Workers*, 417 U.S. 790, held that unions may lawfully discipline member-supervisors for doing what the management employees did here.

> We would require stronger evidence of Congressional intent before we concluded that the policies of the FLSA may not be put into effect because, in cases where an employer cannot readily find replacements for its striking rank and file employees, these policies happen to have an effect on the economic weapons the employers may bring to bear against its striking employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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